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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 568

S. S. W., INC., A CORPORATION,

Petitioner,

and

AIR TRANSPORT ASSOCIATES, INC., A CORPORATION; GOLDEN NORTH AIRWAYS, INC., A CORPORATION,

Intervenors,

vs.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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vs. *Intervenors,*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, S. S. W., Inc. and Air Transport Associates, Inc., and Golden North Airways, Inc., Intervenors, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on July 12, 1951.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 79-86) is reported at 191 F. (2d) 685. The opinion of the District Court (R. 66-71) is reported at 91 F. Supp. 269. The District Court dismissed the antitrust suit brought by Petitioners upon the ground that primary jurisdiction of the subject matter was in the Civil Aeronautics Board. The Court of Appeals reversed the dismissal, but held that as Petitioners must first seek their "remedies from the [Civil Aeronautics] Board • • • the cause should be held pending the conclusion of an appropriate administrative proceeding" (R. 85) before Petitioners can proceed before the District Court. It is only this latter part of the decision of the court below that Petitioners here seek to have reviewed.

Jurisdiction

Motion for Rehearing was denied October 5, 1951 (R. 116). On January 2, 1952, the time for filing Petition for Writ of Certiorari was extended to and including February 2, 1952 (R. 117). The Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented

1. Whether, after the Court of Appeals has decided that the dismissed complaint did state a cause of action under the Federal antitrust laws, and that the treble damage and injunctive provisions of those laws are effective in the air carrier industry, in the absence of any allegation in the pleadings that the acts complained of have been exempted from the antitrust laws by order of the Civil Aeronautics Board, does a statutory construction of the Civil Aeronautics Act and the Federal antitrust laws (particularly the Sherman Act of July 2, 1890) require Petitioners to first

present its evidence in administrative hearings before the Civil Aeronautics Board before it may conclude its suit in the district court under the antitrust laws?

2. Whether the case having been remanded to the District Court for further proceedings, Petitioners who sued both for damages and an injunction, should be compelled to initially present evidence to the Civil Aeronautics Board before proceeding in the District Court; or whether the cause should be remanded now for trial on the merits in the District Court where complete relief is available?

3. Whether the requirement of first proceeding before the Civil Aeronautics Board, when the Court admittedly has jurisdiction of the antitrust cause presently before it, is in effect a denial to Sherman Act victims in the air transportation field of their right to a jury trial?

The Statutes Involved

Petitioners' suits were brought under Section 4 of the Clayton Act, which reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731, 15 U. S. C. 15.

Sections 1, 2, 3 and 7 of the Sherman Act, 26 Stat. 209, 15

The antitrust laws which forbid the conduct in issue are U. S. C. 1, 2, 3 and 7 (R. 6-7). Injunctive relief was also prayed under Section 16 of the Clayton Act, 38 Stat. 731, 15 U. S. C. 26 (R. 8).

The only exemption from these statutory provisions in the air transportation field is Section 414 of the Civil Aero-

nautics Act of 1938 (49 U. S. C. 494) as amended, which provides:

> "Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Section 1106 of the Civil Aeronautics Act (49 U. S. C. 676) provides:

> "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

Statement

Petitioners, small nonscheduled air carriers, sued respondents in the United States District Court for the District of Columbia, charging a comprehensive combination and conspiracy to unreasonably restrain and monopolize the airborne trade and commerce of the United States, stating as the terms of each conspiracy, and the means and methods to effectuate the same, a large number of predatory, discriminatory and restrictive acts and practices injurious both to the Petitioners and the public (R. 1-22).

Respondents filed motions to dismiss on the grounds that the District Court lacked jurisdiction over the subject matter because the primary jurisdiction was in the Civil Aeronautics Board. The District Court filed an opinion

on May 31, 1950 (R. 66-70), and entered an order dismissing the complaint on June 6, 1950 (R. 70).

On appeal the three sitting members of the Court unanimously reversed the District Court's order of dismissal (R. 87), but as to the further direction of the case, two of the judges concluded (R. 79-85) that Petitioners should first present evidence to the Civil Aeronautics Board, the District Court meanwhile retaining jurisdiction of the antitrust suit, while the third judge (Judge Clark) was of the opinion Petitioners should not be required to perform the useless task of first going before the Civil Aeronautics Board (R. 85) and could see no sound reason why Petitioners should have to split their cause of action by first going to the Board for a cease and desist order before coming to the District Court to seek damages (R. 86).

Specification of Errors

The Court of Appeals erred:

1. In requiring Petitioners, after determining that the District Court had jurisdiction, to first present evidence to the Civil Aeronautics Board on the same issues set forth in its complaint filed in the District Court as a condition precedent to proceeding in the District Court, and in staying such proceeding there pending action by the Civil Aeronautics Board, which lacks jurisdiction or power to award damages, particularly in the absence of any claim or showing on the record here that the Civil Aeronautics Board ever made any order relieving respondents from the operation of the antitrust laws.

2. In holding that Petitioners' action for damages and injunctive relief should be made to depend upon any previous determination by the Civil Aeronautics Board in the absence of any allegation that the Civil Aeronautics Board passed any order relieving respondents from the opera-

tion of the antitrust laws, and the fact that there has been no repeal or statutory limitation placed upon the enforcement of the antitrust laws so far as the acts committed by respondents in this case are concerned.

3. In requiring Petitioners to present evidence to the Civil Aeronautics Board, a body without authority to administer and adjudicate under the anti-trust laws, before proceeding with the case in the District Court because this procedure as directed by the court below in that part of its opinion here sought to be reviewed, would require useless and unnecessary time, expense and effort with no purpose being served by the end result obtained in so presenting evidence to the Civil Aeronautics Board; and any findings of the Board could not be binding upon the District Court or jury without thus depriving Petitioners of their rights to a trial *de novo* before a jury, and would deny to Petitioners due process of law.

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED A QUESTION OF GENERAL IMPORTANCE RELATING TO THE CONSTRUCTION OF TWO STATUTES OF THE UNITED STATES, WHICH QUESTION HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

The action of the court below unnecessarily burdens the Civil Aeronautics Board with the useless task of holding hearings, considering evidence and rendering decisions which cannot be binding upon a District Court or jury. The Civil Aeronautics Board is now as much as three years behind in scheduling hearings on pending matters. This useless expenditure of manpower and money by the Board

for a futile purpose will retard the other work of that governmental agency as well as delay the administration of justice. The decision of the court below has so far departed from the accepted and usual course of judicial proceedings by imposing this unnecessary burden upon the Civil Aeronautics Board and Petitioners as to call for an exercise of this Court's supervisory powers by granting this Petition.

The court below attempted to prescribe an accommodation "of the two statutes and of the remedial provisions thereof" (R. 85) by requiring Petitioners to first proceed before the Civil Aeronautics Board before continuing with its suit in the District Court. That requirement of the opinion of the court below, it is respectfully submitted, should be reversed by this Court as the record now before this Court does not show that the respondents have at any time asserted by any pleading filed that the Civil Aeronautics Board has issued any order pursuant to the provisions of Section 414 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. 494), relieving these respondents of the application of the antitrust laws. The bare possibility that the acts complained of would, if presented to the Civil Aeronautics Board, be approved by that body is not sufficient to serve as a basis for this challenged portion of the decision of the court below, requiring Petitioners to first present evidence to the Civil Aeronautics Board before proceeding with its court action. Indeed, the acts with which respondents are here charged could never be approved by the Civil Aeronautics Board.

The court below recognized in its opinion that the procedure it prescribed "may also make for considerable delay" (R. 85).

The court below has attempted by that part of its opinion here challenged to legislate instead of placing the proper construction upon these two statutes. This is borne out by

the last sentence of the majority opinion of the court below which reads (R. 85):

> "But absent specific congressional action to deal with the problem, we see no other way in which to accommodate these conflicting statutory schemes and the principles which follow in their wake."

This question is also important to Petitioners and others in the nonscheduled air carrier industry because "justice delayed" is "justice denied." If a new victim of a Sherman Act violation must first present its evidence to the Civil Aeronautics Board, which under present conditions, will probably not render a decision for at least three years, and then litigate through a Circuit Court of Appeals on a review of that decision, which will take at least one more year before he can proceed in the United States District Court, the statute of limitations will have expired long before the Board's administrative decision has become final. This one fact aside from the enormous expense involved, will operate to deter the enforcement of the antitrust laws.

It would be difficult to overstate the importance of the question, that is, the scope and applicability of the antitrust laws and the relief that may be obtained under them, in the field of airborne commerce. The air transportation industry is still relatively new and each year it has grown tremendously. There could be no more effective way for the large scheduled airlines to retain the entire industry under the control of present operators than to obtain a bar or deterrent against effective enforcement of the antitrust laws. The delay, uncertainty and expense of the requirement to go first before the Civil Aeronautics Board, when the Court has jurisdiction of antitrust complaints, operates as such bar or deterrent particularly where small independent companies such as Petitioners, who must depend on

their own efforts and resources in private antitrust actions, are concerned.

Small companies such as Petitioners may be quickly forced out of business by combinations and conspiracies prohibited by the Sherman Act when the independent for all practical purposes is unable to complain in the courts, under the ruling of the court below.

The question of a vigorous and expanding air transportation industry may go to matters involving National defense. The elimination of the small independent company by unlawful combination and conspiracy in violation of the antitrust laws prevents the resourceful and vigorous independent air carrier from developing and contributing new techniques and new ideas as set forth in Petitioners' complaint. Improved techniques and the larger volume of carriage of passengers and freight resulting therefrom make possible profitable and sound operation at lower rates which in turn permit expansion of the National air commerce and thus provides a large airlift reserve in the event of National emergency.

The ruling of the court below requiring antitrust victims like Petitioners to first go before the Civil Aeronautics Board would seem to operate as a virtual denial of and bar to relief under the antitrust laws because of the uncertainty, delay and expense incident to prosecuting the case before the Board as a pre-requisite to relief by way of damages or injunction in the subsequent court action, particularly in view of the fact that the Civil Aeronautics Board is as far as three years behind in holding hearings on other matters.

2. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE FOURTH CIRCUIT COURT OF APPEALS AND DISTRICT COURTS ON THE SAME GENERAL QUESTION.

The Court below in the decision here sought to be reviewed quoted at length from its opinion in *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, decided July 3, 1951, 20 L. W. 2014 (not yet reported) and relied on the reasoning in that case, applicable to "regulated" industries such as railroads and power, as applying to the air industry. In the *Pennsylvania Water and Power Co.* case the Court below said:

> ". . . where a statute provides for comprehensive and detailed regulation of a particular industry, as do the Interstate Commerce Act and the Federal Power Act, there is . . . as we have indicated, only a *limited area* for application of anti-trust considerations to Commission decisions". (Emphasis supplied)

The Court of Appeals for the Fourth Circuit in the case of *Consolidated Gas Electric Light and Power Company of Baltimore et al.* v. *Pennsylvania Water Power Company et al.*, decided January 3, 1952; 20 L. W. 2302, on a similar conflict between the antitrust laws and the Federal Power Act, held that the antitrust laws were *not so limited* in their application to the power industry. With respect to the *Pennsylvania Water and Power Co.* decision by the U. S. Circuit Court of Appeals for the District of Columbia Circuit, the Fourth Circuit in the *Consolidated Gas Electric Light and Power Co.* case, said:

> "We are constrained to differ . . . for the reasons set out in our opinion in *Penn Water v. Consolidated,*

184 F. 2d 552, and . . . the *dissent* of Judge Wilbur K. Miller of the Court of Appeals for the District of Columbia." *

The decisions of the U. S. Circuit Court of Appeals for the District of Columbia Circuit in the *Pennsylvania Water and Power Co.* case, *supra*, and in the case at bar show that this Court has determined that regulated industries such as air transportation and power are subject to limitations in the application of the antitrust laws which have not been accepted by the Supreme Court, and are in conflict with other Circuit and District Court decisions. *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439; *United States Alkali Ass'n.* v. *United States*, 325 U. S. 196; *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87; *Pennsylvania Water and Power Co.* v. *Consolidated Gas, Electric Light and Power Co.*, 184 F.

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* In the air transportation field where Judge Clark dissented, the U.S. Circuit Court of Appeals for the District of Columbia Circuit, noted in the instant case (R. 83, footnote 33) a conflicting decision in another federal court. *Slick Airways* v. *Air Transport Association, et al.*, D.C.D.N.J. June 7, 1951 (not yet reported), where the court in language applicable here said: ". . . With regard to the type of relief prayed for in the form of damages, there appears to be nothing in the Civil Aeronautics Act which indicates a suspension of the anti-trust laws. . . . I cannot concur with the suggestion that a conspiracy to drive a competitor out of business, as alleged here, is the type of agreement encompassed within the statute and subject to the primary jurisdiction of the CAB for approval or disapproval and for possible immunity from the anti-trust laws. . . . The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved. They view the complaint as alleging combinations or conspiracies to waste the resources of the plaintiff through predatory rate policies, to abuse the privilege of intervention in CAB proceedings, and to conduct a campaign of unfair competitive practices which amount to contracts and agreements within the purview of § 492. It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust laws. . . ."

(2d) 552; *United States* v. *Far East Conference*, 94 F. Supp. 900. In the *Georgia* case, this Court said:

> "But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities." (324 U. S. 439, 456.)

3. THE COURT BELOW MISAPPLIED THE DECISION OF THIS COURT RENDERED IN THE CASE OF GENERAL AMERICAN TANK CAR CORPORATION V. EL DORADO TERMINAL COMPANY, 308 U.S. 422, TO THE FACTS IN THE INSTANT CASE.

This Court stated, at page 433:

> "When it appeared in the course of the litigation that an administrative problem, *committed to the Commission,* was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act . . ." (Italics supplied.)

However, in the instant case now sought to be reviewed, suit was instituted under a long-established statutory right within the jurisdiction of the Court, and no matters alleged in the complaint were "committed to the Board" as in the *Tank Car* case. Hence, that case is not authority permitting the court to split the jurisdiction in the instant case. Particularly is that so because of the following specific provisions of Section 1106 of the Civil Aeronautics Act (49 U. S. C. 676):

> "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common

law or by statute, but the provisions of this Act are in addition to such remedies."

Conclusion

WHEREFORE, Petitioners pray that a Writ of Certiorari be granted by this court directed to the United States Court of Appeals for the District of Columbia Circuit and for such further relief as to this court may seem proper and just.

Respectfully submitted,

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Dated February 2, 1952.

No. 591

FEB 16 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

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GOLDEN NORTH AIRWAYS, INC.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

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Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This is a conditional cross-petition for writ of certiorari filed in connection with the petition of S. S. W., Inc., and intervenors Air Transport Associates, Inc., and Golden North Airways, Inc., in *S. S. W., Inc.* v. *Air Transport Association of America, et al.*, No. 568, filed this Term. Cross-petitioners are certain of the defendants in the suit in the lower courts. The defendants in that suit will be referred to herein as the defendants and S. S. W., Inc., the plaintiff below, as the plaintiff. The cross-petitioners are American Airlines,

Inc., Colonial Airlines, Inc., Capital Airlines, Inc., Northwest Airlines, Inc., Transcontinental & Western Air, Inc. (now Trans World Airlines, Inc.), United Air Lines, Inc., Air Transport Association of America, and Air Traffic Conference of America.

This petition seeks a writ only in the event that the petition in No. 568 is granted and relies on the record therein.

OPINIONS BELOW

The opinion of the District Court of the District of Columbia (R. 66-70) is reported at 91 F. Supp. 269. The opinion of the Court of Appeals (R. 79-86) is reported at 191 F. 2d 658. The plaintiff filed a complaint in the District Court charging the defendants with a conspiracy in restraint of trade in violation of the Sherman Act. The District Court sustained defendants' motions to dismiss the complaint on the ground that the Civil Aeronautics Board has primary jurisdiction over the subject matter of the suit by virtue of the Civil Aeronautics Act of 1938 and that necessary preliminary resort to the Civil Aeronautics Board by the plaintiff was not alleged in the complaint. (R. 70-71). The Court of Appeals likewise concluded that the Civil Aeronautics Board had primary jurisdiction over the subject matter of the suit (R. 83) but directed the District Court to stay the proceeding rather than dismiss it, and to retain jurisdiction of the suit pending action by plaintiff before the Civil Aeronautics Board. A motion by plaintiff for rehearing was denied by the Court of Appeals. (R. 95).

JURISDICTION

The order denying rehearing was entered October 5, 1951. (R. 95). On January 3, 1952, the Chief Justice

extended the time within which to file a cross-petition for certiorari until February 17, 1952. (R. 118). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (Supp. 1951).

QUESTION PRESENTED

Whether, after the District Court and the Court of Appeals have determined that the subject matter of a complaint under the anti-trust laws filed by one air carrier against other air carriers is within the primary jurisdiction of the Civil Aeronautics Board, where the complaint does not allege that the necessary preliminary determinations have been sought by the plaintiff or made by the Civil Aeronautics Board, and where defendants moved to dismiss the complaint at the outset of the suit, the complaint should have been dismissed, as ordered by the District Court, instead of the suit's being merely stayed pending an application by the plaintiff to the Civil Aeronautics Board.

STATUTES INVOLVED

In addition to provisions of the Sherman and Clayton Acts referred to at page 3 of the petition in No. 568, this matter involves the entire Civil Aeronautics Act of 1938,[1] particularly the detailed provisions of Title IV and Title X thereof which provide comprehensive regulation of the competitive practices, services and economics of the air transportation industry under the administration of the Civil Aeronautics Board. However, there is no statutory provision dealing explicitly with the question presented herein.

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[1] 52 Stat. 973-1030 (1938), as amended, 49 U. S. C. §§ 401-681 (1946).

STATEMENT

Plaintiff and defendants are all air carriers and are subject to the direct and comprehensive regulation of the Civil Aeronautics Board.[1] The Civil Aeronautics Act, under which the Board functions, applies to air carriers legal standards quite different from those applicable to business generally. The amount and kind of competition and the business and competitive practices in the air transportation industry are subject to most detailed regulation and restraint. Included in the Act is a requirement that inter-carrier agreements affecting rates, competition, etc., be filed with the Board for its approval or disapproval. 49 U.S.C. § 492. It is provided that when an agreement is approved the anti-trust laws shall not be applicable thereto. 49 U.S.C. § 494.

The complaint in this case charged that the defendants and other air carriers had agreed and conspired together to injure the plaintiff air carrier through cut rates and otherwise, in violation of the Sherman Act, and prayed for an injunction and treble damages. The defendants promptly moved to dismiss as stated above.

REASONS FOR GRANTING THE WRIT

The decision below is plainly correct in recognizing the Civil Aeronautics Board's primary jurisdiction over the matters covered in the complaint and in insisting that the plaintiff resort, in the first instance, to

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[1] The defendant Air Transport Association is an unincorporated trade association whose membership is composed wholly of the air carrier defendants and other air carriers similarly subject to the Civil Aeronautics Board's regulation. The defendant Air Traffic Conference actually is only a division and a part of the foregoing Association.

the Board's process. This view is required by *United States Navigation Co., Inc.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), and numerous other cases.

However, in deciding that the complaint should not be dismissed but instead should be stayed pending an application by the plaintiff to the Board, the Court of Appeals erred. Its decision in this respect is contrary both to the *Cunard* case and to *Armour & Co.* v. *Alton R. R.*, 111 F. 2d 913 (7th Cir. 1940), *aff'd*, 312 U.S. 195 (1941). In each of these cases where, under similar circumstances, primary jurisdiction was found to be in an administrative agency it was held that the complaint should be dismissed. Where the question of administrative jurisdiction does not appear, or is not raised, until the proceeding is in course a stay may be appropriate. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940). But where, as here, it is raised at the outset by motion to dismiss, dismissal is the proper action. The Court of Appeals for the Seventh Circuit has explained the matter thus:

> "In the El Dorado Terminal case the primary jurisdiction point was not raised until after the trial on the merits.
>
> "In the instant case the primary jurisdiction point was urged in limine. Therefore, the reasons for staying the dismissal do not exist, and it cannot be said on the strength of the El Dorado Terminal case that the Trial Court erred in failing to hold this case pending administrative reference and adjudication. We conclude, therefore, that the circumstances here do not require an application of the stay rule as announced recently in the El Dorado Terminal case." 111 F. 2d at 919.

The petition in No. 568 seeks review of the primary jurisdiction question. If that petition is granted, this Court should have the whole case before it, *cf. Langnes v. Green,* 282 U.S. 531, 535-539 (1931), and be in a position to deal with the only question on which the two courts below disagreed and to correct the conflict between the decision of the Court of Appeals herein and the *Cunard* and *Armour* cases. Otherwise an important question of procedure would be left in confusion.

CONCLUSION

If, but only if, the petition in No. 568 is granted, your petitioners pray that a writ of certiorari be directed to the United States Court of Appeals for the District of Columbia Circuit in order that this Court may review the question presented herein.

Respectfully submitted,

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